

POINTS AND AUTHORITIES OF  
APPELLANTS.

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No. 157

IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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*IN ADMIRALTY.*

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THE S. H. HARMON LUMBER COMPANY ET AL.,  
*Libellants and Appellants,*

*vs.*

THE STEAM-TUG "WARRIOR," ETC.,  
*Respondent.*

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E. W. MCGRAW,  
*Proctor for Appellants.*

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JUL 5 1892



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S. H. HARMON LUMBER Co., et  
al.,  
Appellants and Libellants,  
vs.  
STEAM TUG WARRIOR,  
Respondent.

(References are to side paging in Trans-  
script.)

BRIEF OF APPELLANTS.

THE CASE.

On January 5th, 1888, the steam tug Warrior undertook to tow the schooner Sailor Boy from the roadstead off San Pedro to a berth inside of the inner bar. In such attempt the schooner was stranded and suffered damage. It is alleged by libellant that the stranding was the result of negligence on part of the tug; it is alleged by respondent that the stranding was the result of erroneous information given by the master of the schooner to the master of the tug, as to the draft of the schooner. The Court below adopted the theory of the respondent and dismissed the libel.

I.

THE LAW OF THE CASE.

The law of the case is so well settled that we do not anticipate any dispute thereof. It is as follows:

A. While a tug is not a common carrier and is liable only for negligence, still the presumption of negligence is raised by the stranding of a vessel in tow of the tug, in a well defined channel, and the burden of proof to absolve herself is thrown on the tug.

We not mean to say that in all cases of accident to a tow, the burden is on the tug to disprove negligence, but there are cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. The place where the injury occurs is to be considered in connection with the injury itself, and together in this case they satisfactorily show a breach of the contract, if no excuses are given.

The Steamer Webb, 14 Wallace, 414.

The James H. Bristow, 34 Fed. Rep., 77.

The Sarah J. Weld, 40 Fed. Rep., 844.

The Delaware, 20 Fed. Rep., 797.

The Belknap, 2 Lowell, 281.

B. The tug is bound to know the state of tide, depth of water, nature of bottom and condition of channel.

Tillyer vs. Schuyler, 35 Fed. Rep., 551.

Tillyer vs. Schuyler, 41 Fed. Rep., 477.

The Robt. H. Burnett, 30 Fed. Rep., 214.  
 The Henry Chapel, 10 Fed. Rep., 777.  
 The Effie J. Simmons, 6 Fed. Rep., 639.  
 The Maynard, 94 U. S., 494.  
 Transportation Line *vs.* Hope, 95 U. S., 297.  
 Carpenter *vs.* E. T Line, 67 Barb., 570.  
 The Brazos, 14 Blatch., 446.

## II.

### WAS THE TIDE FLOOD OR EBB WHEN THE SAILOR BOY STRUCK ?

This is one of the points in the case.

The testimony very clearly shows the tide to have been ebb. Counsel for respondent in his opening statement in the Court below attempted to hedge against the preponderance of testimony, and stated that it made no difference whether the tide was flood or ebb, provided there was sufficient water. His claim is well founded, with the qualification that there was sufficient water for the draft represented, but not sufficient water for the actual draft, and provided it also be proven that it was equally safe to tow in on an ebb tide as on a flood tide, but on that point the testimony is against him. Their own witness, Captain Simmie, master of another tug belonging to same owners as the Warrior, says they were instructed against towing in on an ebb tide, and did not tow large vessels in on an ebb tide. (Transcript, p. 240.)

It appears that high water occurred at two o'clock P. M. on the day of the disaster.

Respondent's witness Van Geldern, p. 247.

The testimony as to the time the vessel struck is as follows:

Captain Johnson, of schooner Sailor Boy, says: "Left Sailor Boy to pull to tug at 1 P. M. Got back to schooner at 1:30 P. M. (p. 86). Three-fourths of an hour afterward tug came out (p. 87), which brings the time up to 2:15 P. M. Fifteen minutes was consumed in taking hold and getting under headway (p. 87). This brings time to 2:30 P. M. Fifteen minutes after struck on bar (p. 88).

This testimony places the time of striking at 2:45 P. M. on ebb tide.

The foregoing testimony is, to a certain extent, corroborated by that of Melberg, captain of the tug. Melberg says: "I left wharf at 12:30 P. M. (pp. 162 and 176), was fifteen minutes getting from wharf to schooner Reporter" (p. 179).

This brings time to 12:45 P. M. Was twenty minutes taking hold of Reporter (p. 179). This makes time of taking hold of Reporter 1:05 P. M. Towage of Reporter occupied fifteen minutes (p. 180). This brings time occupied with Reporter to 1:20 P. M.

It took forty minutes after that to go out to Sailor Boy (p. 180). This brings time up to two o'clock P. M.

It took us three or four minutes after to pass hawser to Sailor Boy and get started (p. 181). This brings time to 2:03 or 2:04 P. M. Ten to fifteen minutes after that to get out to outer bar (p. 181). This brings the time of accident to from 2:13 or 2:14 to 2:18 or 2:19 P. M. on ebb tide.

True, the witness swears it was flood tide at the time of the disaster, but in doing so he contradicted himself and every disinterested witness in the case.

No other witness swears it was flood tide.

Witness R. J. Brown, who was foreman of a lumber company at San Pedro, and was on the wharf when the tug brought the schooner Reporter in, and remained there till after the Sailor Boy struck, says the Reporter came in at two o'clock or after (p. 31), and that it was three-fourths of an hour after that, and ebb tide, when the Sailor Boy struck (p. 33).

Witness Levi Hannah, who was master of the steamer Eureka, and was on the wharf at San Pedro, watching the Sailor Boy, says it was 2:30 P. M. or later, and ebb tide when the Sailor Boy struck (p. 41).

Capt. D. W. Weldt, who was port-pilot at San Pedro, and was on the wharf that day, says the tide had ebbed five or six inches when the Sailor Boy struck (p. 44). It was about 2:30 or 2:45 P. M. (p. 46). The tide had just started to ebb when the Reporter came in.

Harmon Dahloff, mate of Sailor Boy, who was on her when she struck, thinks she struck at about 2:15 P. M., according to the time on the schooner, which was taken two degrees west (pp. 54, 55). That would be on ebb tide.

Hans Madsen was master of schooner Reporter, which was towed in by tug Warrior just previous to the towing of the Sailor Boy. The Reporter was drawing thirteen feet nine inches (pp. 68, 69, 77). On her way in the Reporter bumped on the outer bar (p. 70). The tide was ebbing when the Reporter got in. That was a matter of remark at the time (pp. 70, 71). It was two o'clock when the Reporter crossed the bar, and the witness so made the entry in his log-book (p. 72). It was high water at two o'clock (p. 75). Seeing that it was ebb tide when the tug started out after the Sailor Boy, the witness then remarked to his mate, "If she is going outside to get the Sailor Boy she will get stuck." He made the remark because he knew the Sailor Boy drew more water than the Reporter (p. 79).

Edward Jahnsen, was master of the schooner Alcatraz, and was on the wharf at San Pedro when the Sailor Boy struck. He testifies that when the tug Warrior let go of the schooner Reporter and started out after the Sailor Boy, the tide was ebbing (p. 121). The tide had ebbed about six inches when the Sailor Boy struck (pp. 125, 126)

On the other hand Capt. Simmie, master of the tug Falcon, and an employee of claimants, says that he left the R. R. wharf at 2:15 to go to the relief of the Sailor Boy, and that he heard the Warrior's signal of distress five minutes earlier (p. 227).

He fortifies his testimony by a memorandum book, which does not by its appearance command very much respect.

Each day's transactions are recorded on a separate page. The entry as to the Sailor Boy is the last entry for the day and still left plenty of space on the page. The entry is in pencil. The whole entry may very easily have been made at a later day, or the original time entered may very easily have been erased and a different time substituted.

The remaining witness on the point is William Barce, who was and is foreman on government works at San Pedro. He testifies that he was on the west wall of the jetty January 5th, 1888, when the Sailor Boy struck. He noticed when she struck, and he put the time down in his book that he always carries as at 2:10 p. m. He was four or five hundred feet from Sailor Boy. He never spoke to any one about seeing the Sailor Boy (p. 208).

But he showed the book to Halstead, claimant's agent, before he came up here; he showed the book to him about two months before he came up. Halstead asked him if he had a memorandum book. The witness carried a library. Sometimes he had one book, sometimes two and sometimes a half dozen on him (Reporters pp. 216 to 219).

The book shown by Barce is a disreputable affair. The entry as to the Sailor Boy is written with an entirely different pencil from any other entry in the book. There is no regularity in dates of entries. The original book is on file in this Court, and we call the attention of the Court to it.

Barce, however, is very careful not to state that the Sailor Boy ran aground at 2:10 p. m., but merely that he entered it on his book as of that time (p. 208).

The testimony of the witness is demonstrated to be false. The west jetty, as will be seen by the chart, which is on file, is a long pile of stone extending, perhaps, a mile from where it connects with the shore, its object being to confine the waters of the channel in a narrow compass, and thereby deepen the water. That the jetty is very little above the water is apparent from the testimony of Barce himself. He says he could not stay there in rough weather; he would be "overboard" (p. 209).

There is nothing in the world to take anyone to the end of that jetty except business on the jetty, and the witness accounts for his presence there by business. After stating that he is foreman of the Government works, he says his position is on the derrick lighter outside of Deadman's Island (p. 207).

He says on the day in question immediately after breakfast he went over to the breakwater to work. He had men employed there then; he thinks about eight men. Now, if it is true that there were no men employed there and no work in progress, it is also true that the witness has deliberately sworn falsely, and it is most improbable that he was on the jetty.

Most of the testimony in this case was taken by deposition, but this witness and Captain Simmie were put on the stand in Court at the tail end of the trial to testify as to matters that occurred at San Pedro. We had no opportunity to get testimony from there to contradict them.

As to Barce, however, the refutation of his testimony happened to be available in San Francisco. The records of the work done in San Pedro were kept by Lieutenant-Colonel W. H. H. Benyard, U. S. A. (pp. 254-5.) We procured the certificate of Col. Benyard which it was stipulated should be received as testimony, as follows:

"In January, 1888, I had a small force of men working on the east jetty at San Pedro, Cal.; none were employed on the west

“jetty. The men worked four days. I cannot state whether they were discharged on the 4th or the 5th. They are, however, put down on my time-sheet as working on the 1st, 2d, 3d and 4th. I am satisfied that no work was done on the west jetty in 1888, as shown from the records in my office” (p. 256).

From this indisputable testimony the falsity of the testimony of Barce appears. No men were at work on either jetty on the 5th of January, and none on the west jetty at any time during that year.

The exact correspondence between the testimony of Barce and that of Simmie as to the time of the disaster, the testimony of the former being shown to have been manufactured out of whole cloth, throws discredit on the testimony of Simmie. Such exact correspondence on a question of time is extremely improbable in the absence of consultation and collusion.

The summary of evidence as to time when the Sailor Boy struck is as follows:

That it was on ebb tide:

Johnson, employee of libellants.

Dahloff, employee of libellants.

Jahnsen, disinterested witness.

Hanna, disinterested witness.

Weldt, disinterested witness.

Brown, disinterested witness.

Madsden, disinterested witness.

*Contra:* Melberg, employee of claimant.

Simmie, employee of claimant.

Barce, perjured witness.

In that connection it is a very suspicious circumstance that claimant has not taken the depositions or testimony of Lundberg, mate of the Warrior, or Monroe, the engineer of the Warrior, or of any of the hands employed on board the Warrior.

The deposition of Melberg shows that all these men were accessible, and that Lundberg and Mason were still in employ of the Company.

We submit that the evidence is irresistible; that the Sailor Boy was towed on the bar at an ebb tide.

### III.

#### CONDITION OF THE BAR.

As to this point there is considerable conflict. Barce swears for claimant that the bar was as smooth as he ever saw it (p. 220).

Simmie, employee of claimant, says bar was “apparently smooth”—a little swell (p. 235). Probably six to nine inches (p. 240).

Meberg, claimant’s employee, says six inches swell (p. 186). He also says he could not tow alongside on account of the swell (p. 166). Capt. Johnson says that the master of the tug told him there was considerable swell on the bar (p. 86).

Capt. Madsen, master of the Reporter, disinterested witness for libellant, says there was considerable swell on the bar (p. 75); a big swell (pp. 76, 77). It was slightly rough on the bar that day (p. 79).

He accounts for his vessel striking with draft of only 13 feet 9 inches by reason of the swell (p. 77).

Capt. Weldt, the port pilot, a disinterested witness, says the sea was quite rough (p. 47). He could tell it was rough from the action of the Sailor Boy when she struck (p. 50.)

Capt. Hanna of steamer Eureka, a disinterested witness for libellant, says it was a "rough day" (p. 41).

The fair inference from the testimony is that the day was fine overhead but that there was more than the average swell on the bar. Sufficient swell to induce extra care on the part of a tug, and to add to the danger of towing a heavy draft vessel.

#### IV.

##### DEPTH OF WATER ON BAR.

As to this question there is some conflict. According to the U. S. official tide tables taken in connection with the official chart No. 610, there should have been on January 5th, 1888, at afternoon high tide, about 14 feet 10 inches. The chart No. 610 in evidence gives a depth of  $10\frac{2}{3}$  feet, with a rise of  $4\frac{1}{10}$  feet, according to time tables, which would make about 14 feet 10 inches. Mr. Von Geldern says that when he measured the bar in May, 1887, the depth was 11 feet two-tenths, (but Mr. Von Geldern's diagram in evidence is in accord with the U. S. chart and not at all in accord with his testimony,) which with a rise of four feet and one-tenth, would give a depth of about 15 feet  $3\frac{1}{3}$  inches (p. 244). When he measured in June, 1888, the lowest water was  $11\frac{8}{10}$  feet, according to his testimony, which contradicts his diagrams. He thinks it reasonable to infer that the depth increased gradually and that in January, 1888, the depth was  $11\frac{5}{10}$  feet, which, with a rise of  $4\frac{1}{10}$  feet, would give a depth at high water on outer bar at 2 P. M. on January 5th, 1888, of  $15\frac{6}{10}$  feet—15 feet  $7\frac{1}{3}$  inches (p. 244-5).

If the depth increased gradually and in a certain ratio for a year probably the theories of Mr. Von Geldern are correct. But there is no testimony as to any such regular and rational increase.

Meberg, the master of the Warrior, swears he sounded the bar when he went out for the Sailor Boy, to assure himself of the depth or the water (p. 163). Madsden says Meberg always used to sound (p. 76).

Capt. Simmie testifies it was always customary to sound (p. 237).

Capt. Hall, who is running there with steamers continually, sounds the bar very often (p. 137).

This custom would indicate a shifting and variable depth on the bar. We were quite surprised to hear a man of Von Geldern's apparent intelligence argue that because he found one depth of water at a given place one year and a greater depth the next year, that it was fair to infer that there had been a gradual and rational increase of depth between the two periods.

On very many bars the depth changes, if not daily, very many times a year. A bar-bound vessel is one whose detention appears almost daily in the shipping reports of the commerce of this coast. In the course of a year a bar may be filled up and washed out a dozen times. Perhaps the San Pedro bar is more stable than many others



on the coast, but the whole evidence shows that no one can rely in practice on such computations as Von Geldern makes. If they were infallible there would be no necessity of sounding. But in fact the tugboat captains, the port pilot Weldt and claimant's witness, Hall, master of a steamer running to San Pedro, were continually sounding the bar, and not when actually crossing it with a vessel. Such soundings might be made to ascertain if the vessel was exactly in the channel. But the soundings spoken of are made to obtain knowledge of the bar, no vessel being in tow or under pilotage.

As to the actual depth of water on the bar on January 5th, 1888, Von Geldern knows nothing. The only witnesses who do know are Capt. Weldt, the port pilot, whose business it was to know and who was continually sounding, and Melberg, master of the tug Warrior. Weldt says it was not over two inches more than marked on the chart (p. 31), *i. e.*, at low water it would be 10 feet 11 inches, and with  $4\frac{1}{10}$  feet rise would be a little over 15 feet on January 5th, 1888, at high water. Aside from the charts Weldt says depth of water was at high tide January 5th, 1888, from 14 feet 8 inches to 15 feet (p. 47).

Melberg, master of tug, swears he sounded the bar that day and that the lowest depth just before high water was 16 feet 4 inches on the outer bar (p. 163). And that it was  $1\frac{1}{2}$  to 2 inches more at high water (p. 184).

Hall, a witness for claimants, estimates the depth of water ~~no~~ <sup>over</sup> outer bar at high tide January 5th, 1888, at 15 feet 9 inches (p. 135).

Von Geldern, as we had already seen, estimates it at 15 feet  $7\frac{1}{5}$  inches. In so estimating, however, he supposed an increase of depth between May, 1887, and January, 1888, of  $\frac{3}{10}$  of a foot. Respondent's witness and tug captain estimates the depth at 15 feet 10 inches (p. 238).

So as to depth of water there is an irreconcilable conflict in the testimony. Only two witnesses profess to have absolute knowledge of the depth at that time, Weldt and Melberg. Weldt was disinterested. Melberg was the man responsible for the disaster, and had every possible inducement to stretch the truth in his own favor. He testifies to six inches more water than his brother tug captain, who, next to him, makes the highest estimate.

The other witnesses merely estimate and guess. The fact that the Reporter, drawing only 13 feet 9 inches, struck when going over the bar on that day, at high tide, or very nearly high tide, is a very strong corroboration of Weldt's testimony as to the then depth of water.

The controversy as to the time when the Reporter was towed in does not weaken the effect of the corroboration, as Melberg says that on the last hour of the tide there is a rise of only an inch or an inch and a half (p. 184).

## V.

### DRAFT OF SAILOR BOY.

Upon this point there is a controversy in the testimony, apparent rather than real. The master of the Sailor Boy gave to the master of the tug 14 feet 6 inches as his draft. The latter, seeking an ex-

cuse for running the schooner ashore, claimed the draft was in fact, 15 feet. The Court below found the draft to be 14 feet 11 inches, or 15 feet, and that the mistake in the draft was the cause of the disaster.

Capt. Johnson, of the *Sailor Boy*, testifies that she was drawing fourteen feet six inches aft and eight inches less forward (pp. 89, 101), which would make the draft 13 feet 10 inches forward, provided her draft astern was 14 feet 6 inches.

Captain Johnson's absolute knowledge of the draft of the schooner is mainly derived, except so far as it is hearsay and inadmissible, from his subsequent experience with her, of which we will speak hereafter.

Captain Mitchell, formerly master of the *Sailor Boy* for five years, and who carried over forty cargoes of lumber on her, who was at Gray's Harbor when she was loading and saw the character of the lumber put on board, says her draft with that cargo would be under 14 feet 6 inches (pp. 107, 108, 109). It was lumber of average heft, green, fresh from the mill (pp. 110, 111).

But with the heaviest kind of pine lumber she would not, with the amount she had on board, draw over 14 feet 6 inches (p. 117).

The trip on which the disaster occurred was Capt. Johnson's first trip on the *Sailor Boy*, but after that and up to the time he testified, he had carried eight cargoes of lumber (p. 99). On that trip she had on board 365,000 feet of pine lumber, 100,000 feet of it being dressed lumber—flooring, and the balance principally scantling (p. 87); 160,000 feet of the cargo was on deck; the rest below (p. 95).

When the witness testified (December 3, 1888), the *Sailor Boy* was in the port of San Francisco, with 390,000 feet of lumber on board, and drawing 14 feet 9 inches aft (p. 90).

The utmost draft of the *Sailor Boy* during these eight voyages of the witness, was 15 feet 1 inch, and then she had on board 393,000 feet (p. 105).

The claimants were afforded every opportunity to ascertain the draft of the *Sailor Boy*. After repairs were made, her next voyage was to Gray's Harbor for lumber.

Particular attention was paid to getting the same class of cargo as was carried to San Pedro. (Testimony Johnson, p. 61.) She had about the same amount of flooring, but a heavier deck load (p. 61). That was the trip when she drew 15 feet 1 inch, and had on board 25,000 to 30,000 feet more lumber than when she was run ashore by the *Warrior* (p. 62). Capt. Freeman, who was an eminent marine surveyor, acting on behalf of claimants, visited the vessel on her arrival at San Francisco, and Capt. Bruce, another surveyor, on behalf of libellants. The two surveyors measured the draft of the vessel as she came into port. It was fifteen feet one inch; then sufficient of the deck load was discharged to make the cargo equal to that which was on board at San Pedro, and then the two surveyors again measured the draft of the vessel and found it to be a little less than 14 feet 6 inches (pp. 61, 62). There is no contradiction of this important testimony and no cross-examination of the witness as to the fact that the measurement was made, and the result thereof. It was not an *ex parte* proceeding, but one in which the claimant was

competently represented and took part. Most probably the claimant has the written report of Capt. Freeman, and knew the statement of the witness to be correct. Unfortunately, Capt. Freeman was dead at the time of the trial, so we were deprived of his testimony. As he was a permanent resident of San Francisco, we never had any legal ground for taking his deposition. We submit that this careful test made by competent experts employed by both parties should be held conclusive as to the draft of the vessel. It was a fair trial made for the express purpose of ascertaining the draft, and the result cannot fail to be convincing.

Against all this testimony we have only the testimony of Capt. Melberg of the Warrior, a witness directly interested in absolving himself from blame.

His testimony is that a day or two after the disaster and when a portion of her cargo had been discharged, he measured the vessel with some carpenter, whose name is not given and who is not produced as a witness. He found the vessel was correctly marked up to 13 feet (p. 170, 171). He then says the master of the Sailor Boy had told him that when the vessel was loaded the rudder-head was two inches out of water. That he measured from the 13-foot mark to two inches below the rudder-head and found that distance to be 2 feet and half an inch, making the draft of the schooner 15 feet and half an inch (p. 172). He also found a black streak on the vessel which indicated she had been submerged to a depth of 15 feet 1 inch, which he assumed to be the water line for the cargo on that trip. The vessel was painted white. He says the mark came from oil and stuff on the bay (p. 172).

That is absolutely all the testimony there is on the part of claimant to substantiate the charge that the vessel drew over  $14\frac{1}{2}$  feet of water.

Capt. Johnson denies that he said the rudder-head was two inches out of water. He says he told Melberg it was about three or four inches out of water at Gray's Harbor, but that he did not measure it with a rule (p. 93).

When she was loaded in Gray's Harbor it was in fresh water, and the draft of the vessel in salt water was about three inches less (Johnson's testimony p. 62-3, Dahllorf's testimony p. 59).

There is no dispute as to this difference in draft between Gray's Harbor and San Pedro, though the testimony concerning it was taken in November, 1890, and the case was not tried until August, 1891.

From the testimony it will doubtless be argued, as it was in the court below, that the lumber absorbed a great deal of water on the way down from Gray's Harbor, but the position is untenable; the cargo was Oregon pine, which does not suck up water as does redwood. It was absolutely green lumber. The logs were in the water until taken to the saw (Johnson's testimony p. 64). When sawed the lumber (except the flooring) was piled in the open air exposed to the rain storms of Washington Territory and by the time it is loaded is about as wet as it is likely to be (Mitchell's testimony pp. 109, 110). The flooring when sawed is put under a shed (pp. 103-106). It is a very wild conjecture that such a water-soaked cargo on

a thirteen days' trip would absorb sufficient water in the deck load to make any appreciable difference in the draft of a vessel. It is solely a conjecture without a particle of testimony to support it. Besides, on the next trip, with the same kind of cargo from the same port, the vessel took aboard as much water (Johnson's testimony pp. 61-64), and on that trip we know from the actual skilled measurement of a surveyor employed by claimant what the draft of the vessel is.

Capt. Melberg's inference that the Sailor Boy drew 15 feet and upwards, because he found a line of dirt and oil on the sides of the schooner indicating that draft, is far fetched. If it be supposed that that mark was made at San Pedro it would be easily accounted for, as when she got into San Pedro she had a large amount of weight, consisting of sea water, on board which was not there before she struck on the bar (Johnson's testimony p. 92, testimony of Brown p. 35, testimony of Melberg p. 185-196).

But the probability is that those marks were the tar streaks made at the San Francisco wharf on the prior trip when the schooner was more heavily laden. (Johnson's on pp. 89-90.)

From the testimony we submit that the great preponderance of testimony is that the Sailor Boy drew not over 14 feet 6 inches at San Pedro.

## VI.

### NEGLIGENCE OF CLAIMANTS.

Under any conceivable aspect of the testimony, claimants were guilty of great negligence.

If the Court adopts Pilot Welldt's testimony as to depth of water, corroborated as it is by Captain Madsden's experiences on the Reporter, it is manifest that there was not sufficient water on the bar to tow in at high-tide a vessel drawing 14 feet 6 inches, and that the tug was negligent in attempting to tow the Sailor Boy in.

If the Court adopts the guesses of Von Geldern and Hall as to the depth of water, then the tug was negligent for not knowing the depth.

If the Court adopts the testimony of the master of the tug as to depth of water, then the tug was beyond any dispute guilty of very gross negligence. Melberg, Captain of the tug, swears that on the day of the accident by his own soundings, the lowest depth on the bar was 16 feet 4 inches before high-water (p. 163). There was one or two inches more at high-water (p. 184). That on such a day as it was then on the bar with 16½ feet of water, that in order to touch the vessel would have to draw 15 feet 9 or 16 feet (p. 186). That the hawser parted in over 16 feet of water (p. 187). The witness further states that if he had been told the Sailor Boy was drawing 15 feet and one inch, he would have refused to tow her in only because of shallow water on the inside bar (p. 197). But in a subsequent portion of his testimony, the same witness testifies: The ordinary draft of vessels that go over the bar is 15½ feet. I tow that kind of vessels all the time with a middling sized tide (p. 204).

But, in fact, the schooner struck on the outer bar as to which the master of the tug swears there was sufficient depth to tow her over

safely even if her draft had been 15 feet 9 inches, or  $8\frac{1}{2}$  inches more than the draft which is claimed by him, to wit: 15 feet and  $\frac{1}{2}$  inch. But there is worse than that for claimant, in Melberg's testimony. Taking the assumed draft aft of the Sailor Boy to be fifteen feet and one inch, and it is undisputed testimony as we have already shown that the draft forward was eight inches less, which would make the draft 14 feet 5 inches forward and 14 feet 9 inches amid-ships. Melberg says she struck amid-ships (pp. 205-206), therefore, according to his own testimony, he ran a vessel drawing 14 feet 9 inches aground, when he had a depth of 16 feet 5 or 6 inches of water, and when he needed only six to nine inches between the keel and the bottom of the sea (p. 186).

Therefore, in any aspect of the testimony, we repeat the tug was negligent.

## VII.

### TOWING ON EBB TIDE.

As we have already shown the vast preponderance of evidence is to the effect that the Sailor Boy struck on an ebb tide. That it was not good seamanship to try to tow her in on an ebb tide is a matter as to which there is no dispute.

Melberg, captain of the Warrior, says he would not have attempted to tow in on ebb tide (p. 173).

Simmie, claimants' master of his other tug, says: "It is not customary to take vessels on an ebb tide. We are instructed to that effect" (p. 240).

Captain Edward Johnson intimates that it is a very risky undertaking (p. 131).

The reason of the danger, even if there is plenty of water in the channel, is obvious, even to a landsman. For a distance of 50 or 60 feet the channel is only 50 feet wide. (Von Geldern, p. 252.) If the schooner under tow is in the exact center of the channel a very slight sheer is sufficient to bring her into shallow water outside the channel. The schooner was towed with a hawser of twenty-five fathoms, 150 feet, (Melberg, p. 166). The current caused by an ebb tide setting against the bows of a vessel would have a tendency to make her sheer, and that tendency would be increased by the swell setting in on the land.

### IN CONCLUSION.

The fact that the Sailor Boy was stranded is established.

If the claim of the respondent be true that she drew fifteen feet of water, and that there was sixteen and a half feet in the channel at the time, the tug is solely liable. The error as to draft did not contribute to her injury as the tug had no business out of the channel. If there was sufficient water and the Sailor Boy sheered out of the channel the tug is liable for attempting to tow in on an ebb tide.

If the tug and tow were not in the channel, the tug is undoubtedly liable.

The most probable solution of how and why the schooner struck is that it was ebb tide; there was a very considerable swell; there was probably a great deal less water in the channel at high tide

than that testified to by the captain of the tug. That while the schooner drawing  $14\frac{1}{2}$  feet might possibly have got over safely at high tide, the diminished depth of water, combined with the swell, was the cause of the disaster.

We submit that the judgment of the Court below should be reversed and an interlocutory judgment in favor of libellant entered with order of reference to ascertain amount of judgment.

Respectfully submitted,

E. W. MCGRAW,  
*Proctor for Appellant.*